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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

KATE CAMPBELL, et al.,
Plaintiffs and Respondents,
v.
JOHN G. HANLIN,
Defendant and Appellant.

A101948

(San Francisco County
Super. Ct. No. 404882)

Plaintiffs Kate Campbell, John Van Veenendaal and Christopher Cole sought to recover moneys owed under a settlement agreement entered into with defendant John G. Hanlin. The superior court granted plaintiffs' motion for summary judgment, ruling there were no issues of material fact warranting a trial. Defendant Hanlin appeals from the judgment entered in favor of plaintiffs. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs sued Hanlin for malicious prosecution. Shortly before trial, on December 1, 1999, the parties and their counsel signed a document, titled "Agreement for Settlement and Mutual Release of Claims." Under the settlement agreement, plaintiffs agreed to dismiss their malicious prosecution lawsuit in return for Hanlin's payment of sixty-seven thousand dollars (\$67,000) in scheduled installments. If Hanlin paid \$52,000 of the moneys owed on a timely basis, his obligation would then be reduced to \$52,000. According to plaintiffs, Hanlin made three payments for a total of two thousand five hundred dollars (\$2,500). Despite plaintiffs' repeated requests, Hanlin made no further payments.

On February 25, 2002, plaintiffs sued Hanlin, alleging he breached the settlement agreement. Hanlin filed a verified first amended answer in which he denied the material allegations of the complaint, alleging he was incapacitated at the time he executed the contract and he did not have “knowledge and/or recollection” regarding the complaint’s allegations. The answer also included seven affirmative defenses: unclean hands, failure to mitigate damages, laches, estoppel, mental incapacity at the time of entering the contract, undue influence, and unilateral mistake of fact. Hanlin requested the complaint be dismissed, and that the settlement agreement be declared void or voidable and rescinded.

Nine months after the filing of their complaint, plaintiffs moved for summary judgment. In support of their motion, plaintiffs submitted a separate statement of undisputed facts addressing the elements of their breach of contract cause of action.

Hanlin submitted a separate statement of disputed facts denying plaintiffs’ assertions, and listing the following disputed facts: that at the time he entered into the agreement, he was mentally incapacitated, mistaken, and under undue influence. In support Hanlin presented his own declaration and that of his attorney, Dennis Weaver, who was present at the signing of the settlement agreement.

The two declarations used almost exactly the same words to describe the following events: Hanlin was deposed on the morning of December 1, 1999. At that time, Weaver was substituting for Hanlin’s counsel of record. Although the parties stopped for “a lunch break,” Hanlin believed his deposition had been completed. Consequently, at lunch, Hanlin and Weaver had many drinks to celebrate the holidays and the conclusion of the deposition. While neither indicate how much Weaver drank, both declarants recalled Hanlin consumed five to seven alcoholic drinks that caused him to become “intoxicated to the point of total incoherency.” Hanlin had stopped drinking completely as of 1996, and his intoxication on December 1 was an aberrant event. Hanlin also recalled he had been suffering from a severe cold or flu for several days, along with headache and back pain. Consequently, he took several Vicodin pills and several tranquilizers during lunch. The medication made Hanlin sleepy and unable to think

clearly. By the end of the lunch Hanlin was having trouble walking and his speech was slurred.

Despite Hanlin's purported condition, Hanlin and Weaver admit they discussed a settlement of the lawsuit with plaintiffs' counsel. Specifically, Weaver and Hanlin discussed that Weaver would not be Hanlin's counsel for purposes of advising him whether to enter a settlement. Further, it appeared to Hanlin and Weaver that plaintiffs' counsel were desperate to resolve the case and did not wish to proceed to trial. Hanlin averred Christopher Cole placed undue pressure on him to "initial a draft settlement," by stating "there was great urgency to obtain a draft of a settlement agreement and attempt to resolve the case."

The defense declarants further averred only a draft of the settlement was discussed. It was their position the settlement would not be effective until "all terms were placed into an integrated document and signed." Hanlin claimed several terms of a proposed settlement were discussed and written down, but he did not participate in the drafting of the document because he was "incoherent." Hanlin noted the settlement agreement contained "provisions that have different dates and language that was pasted to the end of the draft agreement. The Agreement is a compilation of various draft documents pasted together. A final integrated settlement agreement was never agreed upon or executed." Nevertheless, Hanlin averred a final settlement agreement was never executed because "all of the terms were not in accordance with the draft settlement that was discussed and initia[l]ed during [his] deposition." Consequently, according to Hanlin, no settlement agreement existed because it was his understanding a final binding agreement with integration of all terms was a condition precedent to a binding settlement.

As to his payments to plaintiffs, Hanlin averred he paid "without legal obligation or duty, \$1500.00 with the understanding that the case would be resolved since there was no binding final agreement. After payment of such money, the case still did not settle as was expected and the present action was filed."

In reply, plaintiffs challenged Hanlin's opposition on both substantive and procedural grounds. Plaintiffs filed evidentiary objections to the defense declarations on

the grounds, among other things, that some of the statements were inadmissible hearsay or impermissible opinion lacking foundation. Additionally, plaintiffs contended what little admissible evidence did exist was directly contradicted by the recorded statements of Hanlin and Weaver at the time the settlement agreement was signed on December 1, 1999, and by two letters written by Hanlin to Cole in June and August of 2000. In the letters Hanlin acknowledged his obligations to make payments under the agreement. Plaintiffs asked the court to strike the declarations.

Additionally, Christopher Cole submitted a reply declaration in which he set forth the following circumstances regarding Hanlin's December 1, 1999 deposition and the settlement: According to Cole, nothing was said, either on or off the record, about the deposition being concluded at the time the parties took a lunch break. After the lunch break, the parties returned but instead of resuming Hanlin's deposition, the parties began settlement discussions, which were initiated by Weaver. Because trial was scheduled for December 6, and there were at least two more days of Hanlin's deposition to be completed before trial, Cole wanted any settlement to be in writing and "stated on the record" because, without a written settlement agreement there would be no enforceable settlement. Unless the case was settled, Cole intended to complete Hanlon's deposition. Cole observed and spoke with Hanlin during the negotiations. Hanlin did not smell of alcohol, had no trouble walking, and did not appear intoxicated or incoherent. His demeanor was the same as it had been during the years Cole had known Hanlin. Moreover, neither Hanlin nor Weaver said anything about Hanlin's mental incapacity or inability to understand the settlement negotiations, or that Hanlin did not understand his actions and their consequences.

Finally, Cole averred neither Hanlin nor Weaver, nor anyone on Hanlin's behalf had ever denied Hanlin's obligations under the agreement until after the filing of this lawsuit. Over the nearly two and a one-half years between the date of the agreement (December 1, 1999) and the date Hanlin filed his first answer in the case (April 15, 2002), Cole had numerous telephone conversations with and wrote numerous letters to Hanlin, asking him to make the payments under the agreement. In response, Hanlin

never denied his obligations under the agreement. Instead, he always acknowledged his obligation to pay the amounts and asked for additional time to comply with the payment terms.

At the hearing on plaintiffs' motion, Walter Cook, who was specially appearing for Weaver, represented Hanlin. Judge Robertson initially told the parties his tentative ruling was to grant the motion. He did not think the declarations established legal incapacity. The December 1, 1999, transcript demonstrated Hanlin's understanding of the consequences of the contract. Cook opposed the court's ruling, noting intoxication could lead to incapacity to such an extent that a person could not validly enter into a contract, and whether the transcript established Hanlin's capacity and understanding of the consequences was just a conclusion that should be left to the trier of fact. Cook also noted the December 1, 1999, transcript was submitted as part of plaintiff's reply, and did not give Hanlin adequate notice to respond. The transcript did not contain any voir dire regarding whether Hanlin understood the agreement or whether he had been drinking.

Cole and the other plaintiffs' counsel argued the defense declarations were a sham and the court in its discretion could simply disregard false declarations. Plaintiffs also noted the December 1, 1999, transcript was not a necessary part of plaintiffs' prima facie case but was merely submitted to impeach the defense declarations.

The court granted plaintiffs' motion for summary judgment, finding that there were no triable issues of material fact regarding plaintiffs' breach of contract cause of action. The court based its decision on plaintiffs' separate statement and the supporting evidence. Additionally, the court found "the [defense] declarations . . . do not demonstrate, or create an issue of material fact about, [Hanlin's] legal incapacity and that the December 1, 1999, transcript demonstrates affirmatively that defendant understood the nature and probable consequences of the contract. The court also finds that . . . Hanlin's admissions after the fact that additional monies were owed is further evidence that he understood the nature and probable consequences of the contract. With regard to plaintiffs' objections to evidence, the court has only considered admissible evidence."

DISCUSSION

To state a claim for breach of contract, the plaintiff must plead and prove “the existence of a contract, [the plaintiff’s] performance of the contract or excuse for nonperformance, the defendant’s breach and resulting damage.” (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307.) Hanlin raises no issues regarding the elements of performance failure to pay and the resulting damage. The only element at issue is the existence of a contract.

“A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts. [Citation.]” (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810-811.) “Every contract requires the mutual assent or consent of the parties. (Civ. Code, §§ 1550, 1565.) The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe. [Citation.] Accordingly, the primary focus in determining the existence of mutual consent is upon the acts of the parties involved.” (*Meyer v. Benko* (1976) 55 Cal.App.3d 937, 942-943.)

It is not disputed the parties discussed the terms of the settlement. An agreement was drafted containing all the essential terms of the settlement, and all the parties or their counsel signed the agreement. In his declaration opposing the motion for summary judgment, Hanlin contended the agreement included provisions that were on two pages after the signature page. He did not claim those terms were outside the agreement, that any of the provisions were otherwise ambiguous, or that the parties intended to add any additional clauses. “[W]here the terms of an agreement are set forth in writing, and the words are not equivocal or ambiguous, the writing or writings will constitute the contract of the parties, and one party is not permitted to escape from its obligations by showing that he [or she] did not intend to do what his [or her] words bound him [or her] to do.” (*Brant v. California Dairies, Inc.* (1935) 4 Cal.2d 128, 134, italics omitted.) That Hanlin believed a more formal agreement would be signed does not raise a triable issue of fact regarding his consent to the agreement. Hanlin conceded a more formal agreement was not executed because it did not contain all the terms of the agreement that he had signed

on December 1, 1999. In the absence of any contention the execution of a more formal contract would have added anything to what the parties had already agreed upon, Hanlin has failed to raise a triable issue regarding whether the parties contemplated a waiting period before the December 1, 1999, contract became effective. (Cf. *Gavina v. Smith* (1944) 25 Cal.2d 501, 504.) The undisputed facts “lead to the inescapable conclusion that, based upon an objective test of contract formation, the parties mutually assented to the formation of a contract on the terms and conditions set forth in the” December 1, 1999, settlement agreement. (*Meyer v. Benko, supra*, 55 Cal.App.3d at p. 944.)

On the issue of Hanlin’s alleged incapacity, he claims his own declaration and that of his counsel raise a triable issue that his intoxication rendered the settlement agreement void under Civil Code section 38. However, only a person “entirely without understanding has no power to make a contract of any kind.” (Civ. Code, § 38.) The quoted phrase “means a want of capacity to understand transactions of the kind involved. [Citations.]” (*Markus v. Lester* (1922) 59 Cal.App. 564, 566.) Hanlin’s claim of intoxication to the point of “incoherency” is belied by his admission *in the same declaration* that at the afternoon session of his deposition, he understood the parties were discussing not only settling the lawsuit but the terms of the agreement. Consequently, we agree with the trial court that Hanlin’s allegations of intoxication were insufficient to raise a triable issue of fact as to his incapacitation.

To the extent Hanlin argues his averments of intoxication, mistake, and undue influence raise triable issue of facts that the contract was voidable and subject to rescission, such argument is not properly before us. The plaintiffs proved each element of their breach of contract cause of action. The burden then shifted to Hanlin to “show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.” (Code Civ. Proc., § 437c, subd. (p).) Rescission may be a defense to a plaintiff’s breach of contract action. (See Civ. Code, § 1692; *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 278-279, fn. 5.) However, contrary to Hanlin’s contention, plaintiffs were not required to address his rescission defense that was alleged in his verified amended answer. It was Hanlin’s obligation to address the issue in his opposing

papers. He failed to do so. His reliance upon the factual averments in his verified amended answer is misplaced. Allegations in a pleading, even if verified, are not evidence of the facts therein. (See *Mitsuuchi v. Security-First Nat. Bank* (1951) 103 Cal.App.2d 214, 219.) Moreover, rescission was not discussed during argument below, and rescission was neither considered nor ruled upon by the trial court. “[P]ossible theories that were not fully developed or factually presented to the trial court cannot create a ‘triable issue’ on appeal.” (*American Continental Ins. Co. v. C & Z Timber Co.* (1987) 195 Cal.App.3d 1271, 1281.) Under the circumstances, Hanlin has forfeited his right to defeat plaintiffs’ request for summary judgment on the basis of rescission.

In any event, Hanlin averments of intoxication, mistake, or undue influence, standing alone, are not sufficient to support a claim for rescission. Before granting rescission, the courts consider whether a party has waived the right to rescind by ratifying the contract or whether any delay in rescinding has substantially prejudiced the other party. (See Civil Code, §§ 1588, 1589, 1693; *Neet v. Holmes* (1944) 25 Cal.2d 447, 457-460 (*Neet*); *Saret-Cook v. Gilbert, Kelly, Crowley & Jennett* (1999) 74 Cal.App.4th 1211, 1225-1227 (*Saret-Cook*).) In both *Neet*, involving a demurrer, and *Saret-Cook*, involving summary adjudication, the courts determined the plaintiffs were not entitled to rescind their contracts as a matter of law despite evidence from which it could be found the contracts in question were voidable based on fraud or drug intoxication. (*Neet, supra*, at pp. 457-460; *Saret-Cook, supra*, at pp. 1225-1227.) In their responsive brief, plaintiffs discuss both *Neet* and *Saret-Cook*. However, Hanlin presents no argument in his reply brief regarding those cases. Hanlin has failed to adequately address the issue of rescission. The trial court’s ruling on plaintiffs’ request for summary judgment will not be disturbed.¹

¹ In light of our determination, we need not address Hanlin’s contention regarding the trial court’s reliance upon the December 1, 1999, transcript.

DISPOSITION

The judgment is affirmed.

Corrigan, J.

We concur:

McGuinness, P.J.

Parrilli, J.